Supreme Court, U.S.
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UNITED STATES SUPREME COURT
OCTOBER 1997 TERM

MELVIN HARWICK
Petitioner,

Vs.

DEWAYNE "ANDY" ANDERSON, INDIVIDUALLY AND AS SHERIFF OF MCCLAIN COUNTY, OKLAHOMA, A POLITICAL SUBDIVISION OF THE STATE OF OKLAHOMA, BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, AND JOHN DOES, UNKNOWN JAILERS AND DEPUTIES OF MCCLAIN COUNTY, OKLAHOMA
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals erred in sustaining the District Court's ruling that the Respondent was not vicariously liable for the acts of his employees.

2. The Court of Appeals erred in sustaining the District Court's ruling sustaining Respondent's Motion for Summary Judgment.

PARTIES

The caption herein contains all parties to this case and pursuant to SUPREME COURT RULE 14(1)(b) they are not listed here.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS (FULL VERBATIM TEXT SET OUT IN APPENDIX 2)

1. An Order issued by the United States District Court for the Western District of Oklahoma in Case No.: CIV-96-1369-A, filed October 23, 1997.

2. Judgment issued by the United States District Court in Case No.: CIV-9\6-1369-A, filed October 23, 1997.

3. An Order and Judgment issued by the United States Court of Appeals for the Tenth Circuit in Case No.: 97-6390 filed May 7, 1998.

BASIS FOR JURISDICTION

The date the judgment or order sought to be reviewed was entered on May 7, 1998 in the United States Court of Appeals for the Tenth Circuit. There was no request for rehearing. The statutory provision believed to confer this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 USCS § 1254. Notification pursuant to SUPREME COURT RULE 29.4(b) is not required.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE (FULL VERBATIM TEXT SET OUT IN APPENDIX 1)

1. FEDERAL RULES OF CIVIL PROCEDURE RULE 56.

2. 42 U.S.C. § 1983.

3. U.S. CONSTITUTION 14TH AMENDMENT §1.

STATEMENT OF THE CASE

This is a review of a judgment of the United States Court of Appeals for the Tenth Circuit. The basis for the initial Federal Jurisdiction was predicated on a federal question. Accordingly, the basis of jurisdiction is couched under 28 U.S.C. 1331. The facts of this case are as follows:

1. Petitioner was arrested on August 18, 1995 and detained in the McClain County jail until August 25, 1995 without an appearance before a judge. See Appendix 3.

2. Petitioner was arrested pursuant to an out of county bench warrant based on an erroneous allegation of non-support. See Appendix 4.

3. No written policy exists in McClain County with regard to a bench warrant arraignment procedure. See Appendix 5.

4. It is the policy of McClain County to utilize bench warrants as a collection device. Consequently bond amounts are set in the same amount as the arrearage shown on the bench warrant. See Appendix 6.

5. Respondents knew of least 10 occasions where civil arrestees were held without arraignment until they posted a cash bond. See Appendix 7.

6. Respondent Anderson testified that his responsibilities included (a) making sure that Petitioner was given an initial court appearance; (b) making and implementing the policies and procedures regarding arraignments; and (c) operating the jail. See Appendix 8.

7. Petitioner was not in contempt of any order. See Appendix 9.

8. Petitioner repeatedly requested to be brought before the Court during his detention and informed the jail personnel of his right to an arraignment. See Appendix 10.

ARGUMENT

THE COURT OF APPEALS ERRED IN SUSTAINING THE DISTRICT COURT'S RULING THAT THE RESPONDENT WAS NOT VICARIOUSLY LIABLE FOR THE ACTS OF HIS EMPLOYEES.

This case is the epitome of the average American's nightmare. It is more egregious to Petitioner who routinely serves, without pay, as a volunteer police officer, as he was seized and forcibly taken from his job[1] pursuant to an erroneous bench warrant. But that was just the start of Petitioner's nightmare. After being forcibly taken he was then held in jail for almost a week without being taken in front of a judge. Moreover, Petitioner was well aware of his constitutional rights, as he is a police officer.[2] He repeatedly beseeched the sheriff to afford him the most rudimentary of a citizen's rights – to go before a judge and was denied at every turn. Unquestionably Petitioner's civil rights were violated. One would think that under the facts his redress would certainly be available in our court system, but alas, because Petitioner could not actually name the jail personnel he is being denied what only amounts to fundamental justice.

The spirit of 28 U.S.C. 1983 was best stated by Senator Thurman of Ohio when he stated:

> It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit

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[1] Petitioner was a long time employee with the US postal service with a spotless record.

[2] It is further noteworthy that he served his country during the Vietnam war and is a disabled vetran.

> whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

The facts of this case are certainly not complex. Essentially Petitioner was arrested on a bogus bench warrant issued by an out of county judge. The bench warrant was apparently picked up on the teletype machine and the McClain Sheriff's department arrested Petitioner. He was wrongfully held for nearly a week, constantly demanding that he be arraigned so that he might be released. His pleas however fell to deaf ears and he was never taken in front of a judge. The District Court ruled that summary judgment should lie in this matter because Petitioner failed to show "individual participation on the part of the sheriff." Appendix 2. Petitioner named the jail personnel and deputies in his complaint as "John Does," and demanded their names but the Respondent stated that they were unavailable. So then, we must concern ourselves with the vicarious liability of the sheriff. It has been acknowledged that the purpose of 42 USCS § 1983 is to provide a civil action to protect persons against the misuse of power possessed by virtue of state law and made possible because a defendant was clothed with the authority of the state, and that such a defendant subjects another person to deprivation of constitutional rights within the meaning of the statute if he or she does an affirmative act, participates in another's affirmative act, or omits

to perform an act which he or she is legally required to do.[3] Historically, in civil rights action against a sheriff, in order to successfully pursue claim under 42 USCS § 1983 based upon his alleged failure to adequately train or supervise subordinate deputy officers, plaintiff had to provide proof of gross negligence amounting to deliberate indifference, and proof of simple negligence was insufficient to impose liability on either chief or municipality; further, conduct alleged had to be, but was not, proximate cause of subordinate's violation of plaintiff's civil rights. Fratiello v Mancuso (1987, DC RI) 653 F Supp 775. Moreover the Tenth Circuit recently held that the inadequacy of police training may serve as basis for section 1983 liability when failure to train amounts to deliberate indifference to rights of persons with whom police come into contact. Allen v. Muskogee, Okl., 119 F.3d 837 (10th Cir. 1997), cert. denied, 1998 WL 83676 (U.S. 1998) and cert. denied, 1998 WL 83679 (U.S. 1998). Additionally, in denying motions of a county and a county sheriff to dismiss a section 1983 action, the court, in Hill v Marinelli (1982, ND Ill) 555 F Supp 413, held that arrestees, who claimed mistreatment and unlawful arrest, stated a claim where they alleged, as in the case at bar, that the deprivation of their constitutional rights was caused by the county and the sheriff's negligent failure to instruct, supervise, control, investigate, and discipline the officers involved and by the supervisors' direct or indirect approval of the officers' conduct. The court reasoned that although the causal connection between the county's policies and the arrestees might not be a strong one, the court could not conclude that the arrestee could prove no set of facts that would establish such a connection. The court further observed that the sheriff could be held liable under section 1983 if he had personal knowledge of or direct involvement in the complained-of actions. Similarly, with respect to

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[3] See Antieau, Federal Civil Rights Acts § 51.

liability of supervisory defendants under Civil Rights Act, 42 USCS § 1983, complaint, in order to survive summary judgment, must allege either that supervisor ordered or directed constitutional violations, or that supervisor knew or should have known of wrongdoing and did nothing to correct situation even though he had legal obligation to do so, or that supervisor maintained policy which encouraged disregard for constitutional rights. Stoute v Berman (1982, DC Mass) 555 F Supp 507.

In short what the courts have sought is that 'affirmative link' that exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise. The Oklahoma Courts have found that "affirmative link" under the state statute making sheriff accountable for proper management of jail. Meade v Grubbs (1988, CA10 Okla) 841 F2d 1512, 10 FR Serv 3d 1137; Specht v. Jensen, 832 F.2d 1516, 1524 (10th Cir. 1987) (reh'g en banc granted on other grounds, and judgment, but not opinion, vacated Feb. 4, 1988, 837 F.2d 940), quoting McKay v. Hammock, 730 F.2d 1367, 1374 (10th Cir. 1984). See also Rizzo v. Goode, 423 U.S. 362, 371, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976); McClelland v. Facteau, 610 F.2d 693, 695 (10th Cir. 1979). Under Oklahoma law, a sheriff is responsible for the proper management of the jail in his county and the conduct of his deputies. Okla. Stat. Ann. tit. 19, §§ 513 & 547(A). As a result, a sheriff is statutorily liable in a section 1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm. Anthony v. Baker, 767 F.2d 657, 666 (10th Cir. 1985).[4] In Meade the plaintiff alleged that Sheriff Sharp customarily failed to properly supervise his deputies,

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[4] See also Wolfenbarger v. Williams, 774 F.2d 358, 365 (10th Cir. 1985), cert. denied, 475 U.S. 1065, 89 L. Ed. 2d 602, 106 S. Ct. 1376 (1986).

and that he was deliberately indifferent to Meade's constitutional rights. Sheriff Sharp had no contact with the plaintiff but was held liable to plaintiff on the basis of the Oklahoma statute.[5] In Meade the Court reasoned that plaintiff had sufficiently stated a section 1983 claim against Sharp in his individual capacity for improperly hiring, training, supervising and disciplining his deputies. Meade had alleged that the assault was the result of Sheriff Sharp's "common practice and pattern" of improperly hiring, training, supervising and disciplining deputy sheriffs. Since Sheriff Sharp was responsible for establishing the county's policy regarding the use of force in the Oklahoma County jail, the complaint sufficiently attributed the wrongdoing to a county policy so as to withstand a motion to dismiss. See McKay v. Hammock, 730 F.2d 1367, 1375 (10th Cir. 1984) (en banc); see also Rock v. McCoy, 763 F.2d 394, 397 (10th Cir. 1985) (holding that city may be liable under section 1983 if it was grossly negligent in failing to train police officers who allegedly assaulted the plaintiff); Varela v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984) ("custom or policy may include [municipality's] continuing failure to train, supervise, or discipline its police force"). Cf.Garcia v. Salt Lake County, 768 F.2d 303, 308-09 (10th Cir. 1985) (holding that the Sheriff's policy concerning medical care in county jails qualified as policy attributable to a municipal policymaker). Thus the Meade Court held it was error to dismiss the section 1983 claim against the Sheriff since the court could not affirmatively state that the plaintiff could not prove facts that might establish wrongdoing attributable to the county, and that dismissal must be reversed.

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[5] See also City of Springfield v. Kibbe, 777 F.2d 801, 805-09 (1st Cir. 1985), cert. dismissed as improvidently granted, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) (per curiam).

The Oklahoma Statute is unequivocal regarding the liability of the sheriff as stated below:

> 19 Okl. St. § 513 (1997) Custody of jail The sheriff shall have the charge and custody of the jail of his county, and all the prisoners in the same, and shall keep such jail himself, or **by his deputy or jailer, for whose acts he and his sureties shall be liable**.[Emphasis Added]

See also 19 Okl. St. § 547 (1997) which provides that:

> The sheriff shall be responsible for the official acts of the undersheriff and deputy sheriffs, and may revoke such appointments at the pleasure of the sheriff.

It is the fundamental nature of the job that the sheriff or the undersheriff may in writing depute certain persons to do particular acts. A supervisor or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that, as in the case at hand, future misconduct is almost inevitable. Hays v. Jefferson County, 668 F.2d 869, 873-74 (6th Cir.), cert. denied, 459 U.S. 833, 74 L. Ed. 2d 73, 103 S. Ct. 75 (1982). See City of Springfield v. Kibbe, 480 U.S. 257.

The District Court relied on Andrews v. Philadelphia, 895 F.2d 1469, 1488 (3d Cir. 1990), in making its decision. However such reliance is misplaced. In Andrews, the action was based on a sexual discrimination case that turned on the failure of the plaintiff to notify her supervisors of the purported sexual discrimination. Apparently, the plaintiff also could not recognize the harassers because the harassment was made by anonymous phone calls. Unlike the case at bar wherein jail personnel interacted with the Petitioner, consistently and continually denying him his

constitutional rights. It is difficult to comprehend how the District Court could equate a sexual harassment incident with deliberate interference with a person's liberty. Likewise, because of the Oklahoma Statute quoted above, Petitioner does not have to name the personnel responsible for the acts, but only has to make the allegation, which he has done. It is noteworthy that it was the Respondent that refused to provide Petitioner with the names of the deputies and jail personnel that abridged his civil riths.

Additionally, the District Court opines that "plaintiff has proffered no evidence regarding any county policy or custom which could have caused his harm." See Appendix 2. This is absurd. It would highly unlikely that Respondent would have had a policy, which would have denied Petitioner his constitutional rights. This is not the test. The test is since 19 Okla. Stat. §§ 19, 47 impose liability on the Respondent, and he is responsible for policy omissions that he knew or should have known. Accordingly, such questions are fact questions for a jury.

THE COURT OF APPEALS ERRED IN SUSTAINING THE DISTRICT COURT'S RULING SUSTAINING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c), see Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir.1990). The factual record is viewed and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Under Rule 56(c), the moving party has the initial responsibility to show

that "there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party meets this requirement, the burden shifts to the nonmoving party to make a showing sufficient to establish that there is a genuine issue of material fact regarding "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. The nonmoving party may not rest upon "the mere allegations or denials of [her] pleading . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The nonmoving party must go beyond the pleadings and establish, through admissible evidence, that there is a genuine issue of material fact that must be resolved by the trier of fact. Celotex, 477 U.S. at 324. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. Consequently, the relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Carey v. US Postal Service, 812 F.2d 621 at 623. In the case at hand the facts are unequivocally clear. Petitioner was incarcerated for almost one week before being taken before a judge. Appendix 3. Although he repeatedly asked to be taken before a judge his requests were denied. Appendix 10. Add to the foregoing facts the absence of any policy whatsoever to insure that a prisoner's constitutional rights are not violated by Respondent[6] and combined with the statutory obligation of the sheriff an almost certain issue of fact arises. As in the foremost case, Meade v Grubbs (1988, CA10 Okla) 841 F2d 1512, 10 FR Serv 3d 1137, the sheriff customarily failed to properly supervise his deputies, and that he was deliberately

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[6] See Appendix 5.

indifferent to Petitioner's constitutional rights. Although the sheriff had no contact with the plaintiff he was held liable to plaintiff on the basis of the Oklahoma statute imposing liability on him for the actions of his personnel.[7] Let us not forget about what right we are discussing in this petition. It is the right of freedom, and the most fundamental right of system.

> Freedom of movement in the very essence of our free society, setting us apart. It makes all other rights meaningful. Once it is curtailed, all other rights suffer, just as when curfew or detention is placed on a person. William O. Douglas, *Aptheker v. Secretary of State,* 378 US 500, (1994)

Thus it was error to dismiss the section 1983 claim against the Sheriff since the court could not affirmatively state that the plaintiff could not prove facts that might establish wrongdoing attributable to the county, and that dismissal must be reversed.

Respectfully submitted,

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[7] See also City of Springfield v. Kibbe, 777 F.2d 801, 805-09 (1st Cir. 1985), cert. dismissed as improvidently granted, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) (per curiam).

(405) 235-3888

APPENDIX 1

1. USCS Fed Rules Civ Proc R 56 Summary Judgment (a) For Claimant.A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability

alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interroga-ting counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without sub-stantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be

supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party

to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

2. 42 USCS § 1983: Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. USCS Const. Amend. 14 @ 1 (1998).

Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

APPENDIX 2

1. An Order issued by the United States District Court for the Western District of Oklahoma in Case No.: CIV-96-1369-A, filed October 23, 1997.

ORDER

Before the Court are cross motions for summary judgment. Defendant Board of County Commissioners (the County) and defendant Dwayne Anderson (the Sheriff) filed separate motions on August 19,1997. Plaintiff filed a motion for summary judgment on August 191 1997.

On August 18, 1995, plaintiff was arrested pursuant to a bench warrant. The bench warrant, issued on August 11, 1997, indicates that plaintiff is charged with "Indirect Civil Contempt and Meivin Harwick Fails to Appear." The warrant commands the sheriff to detain plaintiff until further order of the Court. The warrant sets a $5,000 cash bond. Plaintiff was not brought before a judge until August 25, 1995. Plaintiff was released on August25, 1997.

Plaintiff brings a number of claims under 42 U.S.C. § 1983. The complaint makes very general allegations of "violation of constitutional rights" against the sheriff and John Does, and claims against the County that it had a policy and practice of wrongful imprisonment and denial of medical treatment, and that it failed to adequately train its officers and jailers. The complaint also charges the "Sheriff and/or Jailers" with negligence1 intentional infliction of emotional distress, and "malicious abuse of process, false arrest, and false imprisonment."[1]

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[1] The Court can only consider claims against named defendants in the case, not against John Does or unnamed "jailers."

Summary judgment is appropriate if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." *Mustang Fuel Corp. V. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204(10th Cir. 1977).

Motion of the County

Local governments may be sued under 42 U.S.C. § 1983 when they are alleged to have violated a plaintiffs civil rights via a policy or custom either officially or unofficially adopted by the local government. *St Louis V. Praprotnik*, 485 U.S. 112,121(1958). Plaintiffs claims against the County are for having a policy and practice of wrongful imprisonment and denial of medical treatment, and for failure to adequately train its officers and jailers. Plaintiff sets out the elements of these claims in the complaint itself but he does not allege facts which support the claims against the County.

Plaintiff has only shown evidence of a single event; one event does not demonstrate the existence of a policy. See *Monell v New York City Dept of Social Services*, 438 U.S. 658 (1977). The only evidence of other similar occurrences is the testimony of Undersheriff Delmar Barrow indicating that on fewer than ten occasions civil arrestees had been held without being taken directly to a judge. Undersheriff Barrow is not a named defendant in this case. His testimony of other incidents gives no detail as to the circumstances involved. Some information on the circumstances of the other incidents would be necessary to demonstrate the existence of a policy.

Harwick has shown no evidence that the County has failed to adequately train its officers or jailers. This type of claim requires a showing of "deliberate indifference to the rights"

of plaintiff. *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1993). The complaint states that defendants acted with "wanton indifference to and deliberate disregard for" plaintiff's rights, but plaintiff alleges no specific fads which support this claim.

Plaintiff has failed to make out a prima fade case against the County. Summary judgment is GRANTED to the Board of County Commissioners of McClain County.

Motion of the Sheriff

The Sheriff moves for summary judgment both in his official and individual capacities. In his individual capacity, the sheriff argues that he is protected by qualified immunity. More to the point is the Sheriffs contention that Harwick has failed to show that the Sheriff had any personal participation in the events of

Harwick's detention. The Sheriff testified in deposition that he had never heard of Harwick until after the filing of this action. Thus he cannot be individually liable for any claim under section 1983 based on his own conduct, nor can he be individually liable for any state law tort.

Summary judgment is GRANTED to the Sheriff in his individual capacity.

In cases under section 1983, "[a]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159,166 (1985) (quoted in *Taylor v. Meacham*, 82 F.3d 1556,1564 (1996). Thus, the claims against the Sheriff in his official capacity must be treated as claims against the County. As with the claims against the County discussed above, Harwick has failed to show any facts that make out a claim of policy or custom, or failure to train.

Harwick has failed to establish that the Sheriff in his official capacity is liable for any state law tort. As discussed above, the Sheriff had no personal involvement in the events of Harwick's detention. To establish respondeat superior liability for a ton, Harwick would have to allege a tort committed by named person who can be shown to be an employee of the Sheriff. Harwick has failed to show that the sheriff is Table in his official capacity for state law torts.

Summery judgment is GRANTED to the sheriff in his official capacity.

Conclusion

The complaint includes claims under the Oklahoma Governmental Tort Claims Act, however these claims were "withdrawn" by plaintiff in his response to the motion of the County. Therefore, claims under the Oklahoma Governmental Tort Claims Act are DISMISSED.

Although the circumstances Of Harwick's detention amount to a prima fade case of violation of due process under 42 USCS § 1983, Harwick has not named any undersheriff or jailer that might be a proper defendant in this action. Accordingly, for the reasons discussed above, Harwick1s motion for summary judgment is DENIED. Summary judgment is GRANTED to the County of McClain and to Sheriff Anderson.

S/_____
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

2. Judgment issued by the United States District Court in Case No.: CIV-9\6-1369-A, filed October 23, 1997.

JUDGMENT

Pursuant to the Order issued October 23 1997, judgment is entered in favor of the defendants, the Board of County Commissioners of McClain County, Oklahoma, and Dwayne "Andy"" Mderson1 individually and in his official capacity as Sheriff of McClain County, Oklahoma, and against the plaintiff1 Melvin E. Harwick.

S/_____
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE
ENTERED ON JUDGMENT DOCKET ON
OCTOBER 23, 1998

3. An Order and Judgment issued by the United States Court of Appeals for the Tenth Circuit in Case No.: 97-6390 filed May 7, 1998.

ORDER AND JUDGMENT*

Before **TACHA, LOGAN,** and **LUCERO**, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Melvin E. Harwick was arrested pursuant to a bench warrant issued by a state court judge which stated on the face

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms. and conditions of 10th Cir. R. 36.3.

of the warrant that plaintiff would be released upon the posting of a $5000 cash bond. Plaintiff was detained in the McClain County, Oklahoma, jail for seven days before being arraigned.

He brought this action under 28 U.S.C. § 1983 alleging violation of his constitutional rights as a result of the delay in the arraignment and because of insufficient attention to his medical needs while incarcerated. Plaintiff also brought various state-law-based tort claims. As defendants, plaintiff named Dwayne Anderson, individually and as sheriff of McClain County; McClain County, by and through its Board of County Commissioners; and John Does unknown jailers and deputies.

In granting summary judgment for defendants, the district court found that plaintiff failed to allege facts to establish a county policy of wrongful imprisonment and denial of medical treatment and, therefore, could not maintain his claim against the county. As to the sheriff, who was sued both individually and in his official capacity, the court held that plaintiff had failed to show any individual participation on the part of the sheriff, thus dooming plaintiff's effort to establish individual liability. With regard to the official capacity claims against the sheriff, the court again concluded that plaintiff had failed to set out facts tending to establish an official policy or custom or failure to train on the part of the sheriff. Because there was no showing of any personal involvement on the part of the sheriff; state law tort claims against him individually similarly failed. Further, because no individuals in the sheriff's employ were named as defendants, plaintiff failed to establish respondeat superior liability in tort to sustain the official capacity suit. Finally, the court found that plaintiff had withdrawn his claims brought under the Oklahoma Governmental Tort Claims Act.

In our de novo review of the grant of summary judgment, we apply the same standard as that used by the district court. See

Jenkins v Wood, 81 F.3d 988, 990 (10th Cir. 1996). That standard is a familiar one: a court correctly grants summary judgment only where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.56(c). As is required, we have examined the record in the light most favorable to plaintiff; as the nonmoving party, and have extended to him all reasonable factual inferences. See Jenkins, 81 F.3d at 990. We affirm.

The court properly granted the motion for summary judgment filed by the McClain Board of County Commissioners. "Under Oklahoma law, the Board has

no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies.". Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988). Only by showing that the Board "voluntarily undertook responsibility for hiring or supervising [McClain] county law enforcement officers," id, would plaintiff even be able to state a claim against the Board under these circumstances. Plaintiff made no such allegation. To the extent plaintiff attempts to establish liability on the part of the county through a theory of respondeat superior, his effort fails because § 1983 does not encompass respondeat superior liability on the part of a municipality. See Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

Turning to the sheriff individually, our review of the record reveals no evidence of any personal participation by the sheriff in the incidents involving plaintiff. It is undisputed that the sheriff had no knowledge of plaintiff's long incarceration without arraignment or the alleged denial of medical treatment until he was informed by his attorney of this lawsuit. The sheriff, therefore, cannot be held individually liable for the situation that befell plaintiff. See Bennett v Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976) ("Personal participation is an essential allegation in a § 1983

claim."); see also Mee v.Otega 967 F 2d 423, 430-31(10th Cir. 1992) (finding no § 1983 liability where there was no affirmative link between the constitutional violation and the supervisor's own actions, citing Meade, 841 F.2d at 1527). Further, because plaintiff did not identify a specific defendant or defendants who personally participated in the alleged harm, he cannot maintain a cause of action against the sheriff individually based on respondeat superior liability. See Andrews v. Philadelphia, 895 F.2d 1469, 1488 (3d Cir. 1990).[1]

Plaintiff also sued the sheriff in his official capacity, thus, in reality attempting to impose liability on McClain County. See Meade, 841 F.2d at 1529. "For a county to be held responsible, it must have caused the harm through the execution of its own policy or custom by those whose edicts or acts may fairly be said to represent official policy." Id. Plaintiff has proffered no evidence regarding any county policy or custom which could have caused his harm. He merely testified to his own knowledge of practices in other sheriff's departments and surmised that the policies and customs of defendant must have been the genesis of the harm to him. This is insufficient to sustain a claim against the sheriff in his official capacity.

Plaintiff argues that the testimony of Undersheriff Barrow is sufficient evidence of county policy. We disagree. Mr. Barrow testified as follows:

---

[1] Plaintiff complains that he was unable to specifically name defendants because jail personnel did not wear nametags. We note that the district court docket sheet reflects as least two extensions of the discovery deadline and an order authorizing the issuance of a subpoena for disclosure of records and appearance for deposition and trial. Given these and other mans available to plaintiff under the Federal Rules of Civil Procedure, plaintiff should have been able to identify specific defendants.

Q: [H]ave you had other civil cases where the judges say till they meet the face of the bond, don't bring them over for an arraignment?

A. On occasion.

Q. On occasion? Can you tell me now many times?

A. I honestly don't remember.

Q. More than 10?

A. Less than 10.

I R. tab 39, Barrow deposition at 24-25.

We agree with the district court that this evidence is insufficient to establish a practice or policy on the part of the Sheriff's Department. Plaintiff provided no detail of the circumstances of those prior incidents. At best, the evidence identifies a practice of the county judges and not one of these defendants.

To the extent plaintiff claimed that the sheriff was liable for failure to train his deputies, plaintiff must put forth evidence tending to establish that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388 (1989). In order to be liable, the sheriff must have had notice that his departmental procedures were inadequate and substantially certain to result in a violation of plaintiff's constitutional rights. See id. at 396 (O'Connor, J., concurring in part). Specifically with regard to a failure to train claim, plaintiff "must prove 'the need for more or different training is so obvious, and the inadequate so likely to result in the violation of constitutional rights, that the..[sheriff] can reasonably be said to have been deliberately indifferent to the need' for additional training." Jenkins, 81 F.3d at 994

(quoting Haris, 489 U.S. at 396). Because plaintiff here seeks to establish liability on the basis of a single incident, he "must show the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued." Id. While the parties do not dispute that the sheriff had the authority to make decisions concerning the operation of the jail, there is no evidence that the failure to arraign plaintiff in a timely manner or the alleged failure to provide medical care were due to any action, inaction, or decision of the sheriff. Plaintiffs claims against the sheriff in his official capacity, therefore, must fail.

Plaintiff states in his opening brief that the federal court had no authority to dismiss his state court action. The federal court did not dismiss a state court action; it granted summary judgment to defendants on plaintiff's state law claims which were part of the federal lawsuit. The federal court had the power to do this and, indeed, was required to so act when plaintiff failed to establish a basis upon which he could prevail against defendants on the state law tort claims.

Finally, plaintiff asserts that the district court erred because it failed to consider the wording on the face of the warrant which directed the sheriff to take plaintiff to the nearest magistrate. These words add nothing to the analysis and do not change the outcome of this case. The district court acknowledged that plaintiff's detention amounted to a prima facie due process violation under § 1983. Unfortunately for plaintiff, however, he was unable to show that the defendants he sued were liable for that violation. AFFIRMED.

Entered for the Court

James K. Logan Circuit Judge

APPENDIX 3

Deposition of Sheriff Anderson taken on May 16, 1997 at pg. 43:

A Yes, sir.

Q He's, I guess, the person you look to far legal advice?

A Yes, sir, especially on Civil cases.

Q Okay. Do you have any personal knowledge as to why Mr. Harwick was ... arraigned on Friday?

A No, sir.

Q And why he wasn't arraigned on Monday?

A No, sir.

Q Or Tuesday?

A No, sir-

Q Or Wednesday?

A No, sir.

Q Or Thursday?

A No, sir.

Q I believe he was let go the following Friday, released that Friday afternoon. Do you know?

A No, sir.

Q Okay. Do you have any way to contact a judge on weekends - -

A Yes, sir.

Q for arraignments? Have you ever done that for an arraignment?

A Not on weekends for arraignments.

Deposition of Delmar Barrow, Undersheriff taken on May 16, 1997 pages 18-22:

A Yes, sir.

Q Did you ever discuss with Judge Ewing yourself that we need to bring this man before the court on an arraignment?

A No.

Q Did you ever have any discussions with the secretary/bailiff that we need to bring this man before the court on an arraignment?

A I requested twice to get him before the court and was refused twice.

Q Okay. So you requested Friday afternoon?

A Yes.

Q And the secretary/bailiff said they were over, or did you talk to Judge Ewing on Friday afternoon?

A I talked to the secretary/bailiff.

Q By secretary/bailiff we're going to refer to her as

A At that time crystal wells.

Q Okay. And then Monday you attempted again?

A Yes. Monday I had him on the arraignment list and was -- and was told, no, and scratched his name off.

Q Okay. Let me hand you what's been previously marked Plaintiff's Deposition Exhibit 8 and ask you if that is a copy of the arraignment list you're discussing for Monday, August 21st 1995?

A Yes.

Q And so when the secretary/bailiff said don't bring him over we're not going to give him an arraignment, you scratched his name off?

MS. JONES: I object to the form.

THE WITNESS I can't answer that yes or no.

(BY MR. BOREN) Let me rephrase. So when the secretary/bailiff said don't bring him over, what did you do?

A When they called for arraignments that day1 she said all of your arraignments except Harwick.

Q And do you know why she specifically excepted Harwick?

A I do not, no.

Q Have you had an occasion to ask Judge Ewing since lawsuit was filed?

A No.

Q What is Judge Ewing's typical reputation or character, or how would you describe it?

MS. JONES: Is this a fair question?

MR. BOREN. I think in this lawsuit it is.

THE WITNESS: I would answer that off the record. Judge Ewing may not always be right, but he is the judge.

Q (BY MR. BOREN) Okay. So Tuesday, the next day, what did you do? Did you put him on the arraignment list again?

A No, I did not.

Q And why didn't you do that?

A Monday when we were told not to -- to except him and not bring him to court, I was again given the answer, be governed by the bond on the face of the warrant. I just done that.

Q Okay.

A In other words, as far as I was concerned, the bond at $5,000 cash.

Q Okay. But didn't you also realize at that time that were other prisoners that had bonds on their warrants were being taken before the court for an arraignment?

MS. JONES Object to the form.

(BY MR. BOREN) Did you realize at that time - - go on and answer. I mean she objected to it, but you can still

A Yes.

Q Did you believe that was fair or right?

A I -- we need to go off the record with that.

MS. JONES: You can answer him. He wants to know your opinion.

THE WITNESS: Whether I thought it was fair or not doesn't matter.

MS. JONES: Well he's just asking you what you think. Go ahead.

THE WITNESS. No, I did not think it was fair.

Q (BY MR. BOREN) And then Tuesday what did you do to try to yet him on the arraignment -- or try to get him an arraignment? Let me rephrase that. Tuesday, what did you do to try to get him on the arraignment list again or to bring tim before the court for an arraignment?

A I don't recall.

Q Well, did you at that time just give up trying to get him before the court, or did you just consider at that time - -

A I considered at that time that his bond was $5,000 cash

Q And until he could post $5,000 cash, he would stay here?

A Yes.

Q And he would stay there without the opportunity for an arraignment?

A Without the opportunity for arraignment., yes.

Q And did you believe that to be true again on Wednesday?

A Yes, I did.

Q And how about on Thursday?

A Yes I did.

Q And what happened Friday?

A Friday, for some reason, when they called for Arraignments they told me to bring Melvin Harwick before the court.

Q And when you say they?

A Judge Ewing through his bailiff.

Q The same bailiff we've discussed before?

A Yes.

Q And why did they at that time decide to conduct an arraignment?

A I can't answer that. I don't know.

Q They just said bring him?

A Yes.

Q Okay. If they had not called, how long do you think Mel Harwick would have stayed in McClain County Jail, if that call had not occurred?

A In lieu of bond?

Q In lieu of bond.

A I don't know. I can't answer that.

Q Okay. Could have been indefinitely?

MS. JONES: object to the form.

THE WITNESS: I don't know.

Q (BY MR. BOREN) Well, how long before the sheriff's department would have done something on their own or just let Mr. Harwick go before he had an arraignment?

A We couldn't let him go. He was being held in lieu of bond

Q Without an arraignment?

MS. JONES: Object to the form. You understand his question?

APPENDIX 4

Deposition of Judge Ewing taken on July 31, 1997:

holiday, it tends to be even worse. You might have I've had as high as in the 20's to arraign. And when you do that, probably two-thirds of them have made bond. If it's a warrant arrest, we have a practice of puttin9 bonds on there in advance so they can make bond immediately after their arrest. They call the bondsman or post cash, or, you know, put up - there's no procedure for putting up property, but if they've got the cash or a bondsman, they get out of jail.

Q Is that the procedure in a civil warrant?

A Right, right There's a slot on the civil warrants for setting bond, and generally, those are child support matters. Probably 80 to 90 percent of them are child support matters, and usually, it's being - the plaintiffls attorney will be there asking for it, and the amount will be the approximate value of the arrearage of the support plus a reasonable attorney's fee for the prosecution of the contempt citation, and I round it off.

Q well, let me hand you -- I think you're looking at the same thing.

A Right.

Q This one has been marked as Plaintiff's Deposition Exhibit Number 1?

A Right.

Q And ask you to identify that bench warrant?

A That looks like the one on Mr. Harwick. It doesn't have a file stamp on it, this one doesn't. The one I have has a file stamp on August 22nd, 1995.

Q Is that an extra copy, the one you have, or is that the court file?

A This is the one Ms. Jones provided me.

MR. BOREN: Do you mind if we mark that as an extra copy?

MS. JONES: That's fine.

MR. BOREN: Since he's referring to that one, also

Q (By MR. BOREN) I'll mark the one that is file stamped as Plaintiff's Deposition Exhibit Number 2.

A Okay.

Q But right now, regarding civil bench warrants, you indicated there was a cash bond or some bond that is set?

A Right, right. The distinction being if it's a contempt situation, you're dealing with a slightly different critter from an ordinary criminal citation. There's an equitable maxim that says contempt is Coercive, and I would, rather than lead those people to believe that it's a good deal to pay a bondsman, which a bondsman, I would assume, would charge at least 10 percent, I would rather see the man's or the woman's spouse, or whoever the aggrieved party is, get the money than a bondsman.

Q And that's the reason that, for example, the cash bond was –

APPENDIX 5

A Yes, sir.

Q So, basically, when Mr. Harwick was incarcerated, the standards by plaintiff's Exhibit Number 1 were basically the exact same?

A Yes.

Q Okay. And if there's anything material in the difference of the old jail standards and the new jail standards as we discuss this, you'll let me know?

A Yes, I'll let you know, but I don't think there will be.

Q Okay. Is there anything in Defendant's -- or excuse me, plaintiff1s Deposition Exhibit Number 2 that talks about arraignment procedures?

A No

Q Okay. What does McClain County utilize as a policy for basis for arraignment procedures?

A We're governed by the court.

Q Okay. So it's the custom of what you've been doing, or do you have a specific court order that says how the arraignments are to be utilized or followed?

A No, not to my knowledge.

Q Okay. So you don't have a court order for them?

MS. JONES: He asked you do you have a court order.

THE WITNESS: No.

Q (BY MR. BOREN) Okay. When you say you're governed

by the court, will you explain what you mean by that?

A It's the judges' practice here that we have our arraignments daily, Monday through Friday. They're generally done at 1:30 in the afternoons, 1.30 p.m, and whichever judge has the clear docket is the one that will call to do the arraignments, and he'll call downstairs and say bring all your prisoners for arraignment before my court.

Q And then the sheriff takes all the prisoners that have not had an arraignment before that judge?

A We do, yes.

Q You're not contending that that was done with Mr. Harwick for approximately one week, are you?

MS. JONES: Not contending what?

Q (BY MR. BOREN) That he was taken up for one week?

A Mr. Harwick, for some reason, - -

MS. JONES: Just answer his question.

THE WITNESS: All right. May I have the question again?

Q (By MR. BOREN) You're not contending that Mr. Harwick was taken before a judge prior to the end of one week or eight days, are you?

A No.

Q Okay. And what were you going to say in your explanation?

A Mr. Harwick, for some reason, was excepted by the

A Yes.

Q To set bond without -

A That's what I --

MS. JONES: wait for his question.

Q (BY MR. BOREN) Okay. But as undersheriff you know that indefinite detention without due process or an arraignment violates somebody's Civil rights, do you not?

A That's not a yes or no answer either. His bond was set.

Q You don't believe that an individual should be taken an independent judge upon arrest to determine and the warrant and set a bond?

A In a criminal case, yes. In a civil case, the judge that issues the bench warrant should be the judge that reviews -- that does the arraignment or reviews the warrant.

Q So you say there's a difference between criminal and civil cases?

A Yes.

Q Is that the policy of McClain County sheriff's Department?

A No.

Q Is that normal? I mean have you had other civil where the judges say till they meet the face of the don,t bring them over for an arraignment?

A On occasion.

Q On occasion? Can you tell me how many times?

A I honestly don't remember.

Q More than 10?

A Less than 10.

Q And that's less than 10 since you've been here or since 1989 since you've been undersheriff?

A Yes

Q You heard Mr. Harwick's testimony yesterday, did you not?

A Yes.

Q Are you in agreement with him that upon arrest an individual is entitled to an arraignment as quickly as reasonably is possible?

A Yes.

APPENDIX 8

Deposition of Sheriff Anderson taken on May 16, 1997:

Q You don't know? He never told you about those?

A No, sir.

Q okay. would you say it's true that the sheriff is typically responsible for making sure that the constitutional rights of inmates in his jail are not violated?

A Yes.

Q And isn't it true that the sheriff is responsible to make sure that an inmate that is incarcerated in his jail will go to court after the initial arrest?

A Yes.

Q Do inmates in the McClain County Jail have a certain period of time to wait before they are taken before the court after their arrest

A Certain period of time, no, unless they're int0oxicated.

Q Okay. Do you have a period of time that you make sure they get before a court after their arrest? what's your policy regarding that?

A The DA'rs office and the court is notified every morning of who is back there and the ones that have not been arraigned and so forth.

APPENDIX 9

Deposition of Melvin E. Harwick taken on May 15, 1997:

A Yeah, that's what's later, but I was never As I said, I didn't know anything about it.

Q I'll hand you the bench warrant on what you were and ask you to take a moment and look at that.

A Very well.

Q Have you had a chance to look at that?

A Uh~huh.

Q Is that yes?

A Yes, 1 have looked at this.

Q Before today have you seen a copy of this bench warrent

A Yes, I have.

Q And do you remember the first time you saw it?

A No, I do not.

Q Was it --

A Sometime while I was incarcerated.

Q And you see clearly that it says on there $5,000 cash bond.

A Cash bond, yes.

Q Do you have any complaints --

A Somebody has crossed out surety or property, see.

Q Right.

A I was made aware of this when I tried to get that bond lady when I was down there in jail.

APPENDIX 10

Deposition of Harwick taken on May 15, 1997:

Page 212 line 23:

A. The judge was made aware that I was here. He was made aware that I wanted an arraignment and a bond.

Supreme Court, U.S.
FILED
AUG 0 6 1998
OFFICE OF THE CLERK

No. 98-56

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

MELVIN HARWICK,
Petitioner,

vs.

DWAYNE "ANDY" ANDERSON, INDIVIDUALLY AND AS SHERIFF OF MCCLAIN COUNTY, OKLAHOMA; MCCLAIN COUNTY, OKLAHOMA, A POLITICAL SUBDIVISION OF THE STATE OF OKLAHOMA, BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS; AND JOHN DOES, UNKNOWN JAILERS AND DEPUTIES OF MCCLAIN COUNTY, OKLAHOMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

This Petition seeks review of the limited question of whether a county sheriff may be held liable in his official capacity for the acts of his employees on the basis of vicarious liability. As detailed below, there is no compelling reason for review of this legal question which has been previously settled by this Court. Substituting fiction for fact, Petitioner has grossly distorted the cause of his arrest, subsequent incarceration and policy of the Respondent sheriff.

This case involves the Petitioner Melvin E. Harwick who intentionally let the only mode of transportation available to his four children and ex-wife become repossessed in violation of his divorce proceedings temporary order. As a result, the McClain County, Oklahoma state court judge issued a contempt citation for Petitioner's violation. Petitioner disregarded the contempt citation and failed to appear for the hearing. Subsequently, the judge issued a bench warrant for Petitioner's failure to appear on the contempt citation and set bond on the face of the warrant at $5,000.00 cash. This cash bond was the nearest whole dollar amount to the amount Petitioner was in arrears in his financial obligation to his children.

Two days prior to his arrest, Petitioner learned of the bench warrant, but did not contact the issuing judge, the bailiff, the sheriff's office or his own counsel. On August 18, 1995, Petitioner was arrested by the Oklahoma County Sheriff's Office pursuant to the warrant and subsequently transported to the McClain County Jail.

Petitioner brought this civil rights action pursuant to 42 U.S.C. § 1983, against, among others, Respondent

Dwayne "Andy" Anderson as Sheriff of McClain County. The petition seeks review limited to the question of vicarious liability of the Respondent sheriff in his official capacity.

A. The Petition Misstates the Facts Material to the Consideration of the Question of Whether the Respondent Sheriff is Vicariously Liable for the Acts of His Employees.

Petitioner admitted that the Respondent Sheriff was not at fault for Petitioner's arrest. (R. 43, Ex. A, pp. 201-2). Petitioner admitted that the only reason he sued the Respondent sheriff is, because as the sheriff, he is responsible. Petitioner has no evidence of any personal participation by the sheriff in the incident giving rise to this lawsuit. (R.43, Ex. A, pp. 237-40). Respondent sheriff testified that Petitioner's incident is the only one of which the sheriff is aware. (R.43, Ex. C, p. 67). Petitioner admitted that he is not aware of any unconstitutional policy of the Respondent sheriff which deprived Petitioner of a constitutional right. (R.43, Ex. A, pp. 240-41).

B. The Petition Presents Facts Unsupported by the Record and Immaterial to the Question Presented for Review.

Petitioner contends he was arrested pursuant to an out of county bench warrant based on an erroneous allegation of nonsupport and was not in contempt of any order. Assuming, *arguendo*, these contentions are true, they are immaterial to the question presented for review. In other words, whether the state court judge was incorrect in his assessment of Petitioner is irrelevant to the Respondent's policy concerning arraignments. Furthermore, Petitioner's contention that he

was arrested on an erroneous allegation is not supported by the referenced Appendix 4 or the record.

The contemptuous nature of Petitioner's "fact" number 7, albeit immaterial, requires a response. It is unimaginable how Petitioner can repeatedly state that he "was not in contempt of any order," while he allowed the only mode of transportation available to his four children and ex-wife who required medical care to become repossessed in violation of the order in *Harwick v. Harwick*, District Court of McClain County, Case No. FD-94-205. Certainly, Petitioner and his counsel would not have agreed that Petitioner was to provide a substitute vehicle if he had not been in contempt of the state court's order. (R.47, Ex. J, Temporary Order filed March 28, 1995, Citation for Indirect Civil Contempt filed April 5, 1995, Court Minute filed August 11, 1995).

Petitioner's statement that he "repeatedly requested to be brought before the Court during his detention and informed the jail personnel of his right to an arraignment," is a blatant misrepresentation of the evidence. The deposition testimony cited by Petitioner in his Appendix 10 does not support such a contention. The fact that the state court judge was aware that Petitioner was in jail and wanted an arraignment does not equate to Petitioner repeatedly informing jail personnel of his right to an arraignment.

C. The Petition Misrepresents the Respondent's Policy Concerning Arraignments.

The fact that no written policy exists in "McClain County" with regard to a bench warrant arraignment procedure is immaterial to whether vicarious liability exists in this case. Petitioner's assertion that "it is the policy of

McClain County to utilize bench warrants as a collection device," is a misstatement of fact. Petitioner's assertion is nothing more than argument not factually supported by the record. The deposition testimony cited by Petitioner in Appendix 6 does not support this argument.

Petitioner's contention that the Respondent knew of at least ten occasions where civil arrestees were held without arraignment until they posted a cash bond is also a misstatement of fact. The testimony cited in Appendix 7 does not lead to the unsupported assumption that any individual has ever been detained without an arraignment due to his failure to post bond.

REASONS FOR DENYING THE WRIT

The Petitioner's claim that the courts below erred in determining that the Respondent was not vicariously liable for the acts of his employees under 42 U.S.C. § 1983 does not warrant review by this Court. The decision below was a correct application of settled law, and no conflict among the circuits is alleged.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court addressed local government liability under 42 U.S.C. § 1983. In *Monell*, this court rejected government liability based on the doctrine of vicarious liability. *Id.* The Court held that a government entity is only liable under Section 1983 when the constitutional injury can fairly be said to have been caused by that entity's own policies and customs. *Id.* Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. *Id.* at 691-92.

In furtherance of his argument that vicarious liability exists in this case, Petitioner states, "a sheriff is statutorily liable in a section 1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm." (Petition at 9). Petitioner contends that this "statutory liability" is created as a result of Oklahoma law, under which a sheriff is responsible for the proper management of the jail in his county and the conduct of his deputies. (Petition at 9). A violation of state law, however, is not a basis for a Section 1983 action since 42 U.S.C.§ 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (emphasis added).

Petitioner also incorrectly intertwines the requisites for individual liability with those of official liability. Petitioner states that because he could "not actually name the jail personnel he is being denied what only amounts to fundamental justice." (Petition at 6). Petitioner further states he demanded their names but was denied the same. (Petition at 7, 12). These statements are unsupported by the record as well as even a citation to the record. Furthermore, these statements reflect Petitioner's fundamental misunderstanding of individual liability which requires evidence of personal participation in the alleged harm before liability may attach. *Bennet v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976).

To establish personal liability in a Section 1983 action, it is enough to show that the individual, acting under color of state law, caused the deprivation of a federal right. A greater burden, however, is required in an official capacity suit. In an official capacity suit, a plaintiff must prove that his injury was attributable to a "policy" or "custom" of a county. *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988).

Before a plaintiff can meet his burden of proof, he must show not only that an official policy or established custom exists, but also that such a policy or custom caused him to be subjected to a deprivation of his constitutional rights. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). *See Hinton v. City of Elwood, Kan.*, 997 F. 2d 774, 782 (10th Cir. 1993) (plaintiff must show that there is a direct causal link between the policy or custom and the injury alleged). Furthermore, "[i]f the plaintiff asserts the alleged custom or policy comprised a failure to act, he or she must demonstrate the municipality's inaction resulted from deliberate indifference to the rights of the plaintiff." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996)(citations omitted).

In the present case, there is no evidence suggesting the Respondent sheriff has an officially adopted policy favoring the detention of inmates without an arraignment. If a violation cannot be characterized as officially adopted policy, then the municipality can be held liable only if the practice is so permanent and well settled as to constitute a custom or usage with the force of law. *Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996). In order to establish a custom, the actions must be persistent and widespread practices of the officials. *Id.*

An inference that a policy exists based on the isolated conduct of an officer and then holding a municipality liable as a result of that policy amounts to the theory of strict respondeat superior liability expressly rejected in *Monell*. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 831, 105 S. Ct. 2457, 85 L. Ed. 2d 791 (1985). Where a plaintiff seeks to impose municipal liability on the basis of a single incident, the plaintiff must prove the single incident was caused by an existing, unconstitutional municipal policy. *Jenkins v. Wood, supra.*

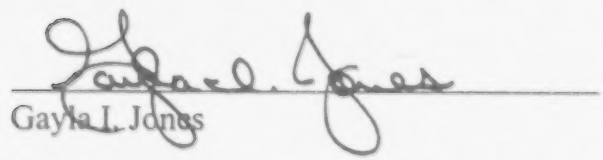
With regard to Petitioner's claim that vicarious liability stems from a failure to train, this Court has recognized "that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under Section 1983." *City of Canton v. Harris*, 489 U.S. 378 (1989). This Court did not include vicarious liability as one of those limited circumstances. *Id.*

Petitioner is challenging well established law, and his effort to do so does not call for this Court's review.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, to be admitted to practice before the Supreme Court of the United States effective August 7, 1998, hereby certifies that on August 6, 1998, three copies of the foregoing Brief in Opposition were served, by certified mail, postage prepaid, to the following counsel of record for Petitioner:

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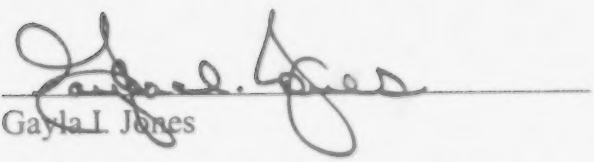

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